

# Los Alamos National Laboratory <sup>3</sup>/<sub>4</sub> Supplemental Instructions

Section: 9 Subcontractor Qualifications

Subject: 9.3 Organizational Conflicts of Interest

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**PURPOSE:** This Supplemental Instruction (SI) describes the policy and procedures to be used to address potential organizational conflicts of interest (OCIs).

**POLICY:** It is the policy of the Laboratory to ensure that its subcontractors (and any of its affiliates or their successors in interest) are not biased because of their financial, contractual, organizational, or other interests which relate to the subcontract work and that they do not obtain any unfair competitive advantage over other parties by virtue of their performance of the Laboratory subcontract.

**SCOPE:** This SI apply to subcontracts, consultant agreements, task orders, work releases, significant modifications, and follow-on subcontracts for Advisory and Assistance Services (see definition below).

Exclusions The following types of work are excluded from the formal requirements of this SI:

- Transactions below the Simplified Acquisition threshold (see SP 13.1, *Small Purchases*).

**Note:**

Consultant agreements shall be evaluated for OCI at any dollar level.

- Research on theoretical mathematics and basic research involving medical, biological, physical, social, psychological, or other phenomena.
- Routine information technology services unless they are an integral part of a contract for the acquisition of Advisory and Assistance Services.
- Architectural and engineering services as defined in the Brooks Architect-Engineers Act, which are as follows:
  - professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;

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- professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
- such other professional services of an architectural or engineering nature, or incidental services which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

## **Caution:**

- Project or program management/control services not related to a construction project that may be performed by architect-engineer firms are not exempt from the requirements of this SI; and
- Design-build procurements shall be evaluated on a case-by-case basis.

## **DEFINITIONS:**

Advisory and  
Assistance Services

Those services provided under a contractual arrangement by non-Laboratory sources to support or improve:

- organizational policy development;
- decision-making;
- management and administration;
- program and/or project management and administration;
- research and development activities; and
- professional advice or assistance rendered to improve the effectiveness of management processes or procedures (including those of an engineering and technical nature).

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Outputs of such services may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training, and the day-to-day aid of support personnel needed for the successful performance of operations.

All Advisory and Assistance Services are classified as either **Management and Professional Support Services; Studies, Analyses, and Evaluations;** or **Engineering and Technical Services** (see respective definitions below).

Affiliate

For the purposes of this SI, affiliation occurs when a business concern is controlled by or has the power to control another or when a third party has the power to control both.

Engineering and  
Technical Services

Contractual services used to support the program office during the acquisition cycle by providing such services as systems engineering and technical direction to ensure effective operation and maintenance of a major system as defined in OMB Circular No. A-109 or to provide direct support of a weapon systems that is essential to research, development, production operation, or maintenance of the system.

Management and  
Professional Support  
Services

Contractual services that provide assistance, advice, or training for the efficient and effective management and operation of organizations, activities (including management and support services for R&D activities), or systems. Included are efforts that support or contribute to improved organization of program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, performance auditing, and administrative/technical support for conferences and training programs.

Organizational  
Conflict of Interest

An OCI exists when an offeror or a subcontractor has past, present, or currently planned interests that (1) either directly or indirectly, through a client relationship, relate to the work to be performed; and (2) may diminish the offeror's or subcontractor's capacity to give impartial, technically sound assistance and advice or may give the offeror or subcontractor an unfair competitive advantage.

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Studies, Analyses and  
Evaluations

Contracted services that provide organized, analytical assessments/evaluations in support of policy development, decision-making, management or administration. Included are studies in support of R&D activities, acquisitions of models, methodologies, and related software supporting studies, analyses, or evaluations.

## PROCEDURES:

Pre-Procurement  
Fact Sheet

The procurement specialist shall review purchase requests and modifications to determine if the proposed work appears to fall into a category of Advisory and Assistance Services as defined above. If it is determined that the work will involve Advisory and Assistance Services, the procurement specialist shall obtain a *Pre-Procurement Fact Sheet*, (Form 903a), (Exhibit 9.3a) from the requester. When necessary, the procurement specialist will assist the requester in completing the *Fact Sheet*. The requester shall certify to the accuracy of the completed *Fact Sheet*.

When the work required under a subcontract or a modification to a subcontract is determined to be within the definition of Advisory and Assistance Services, award will **not** be made until a written review and approval of the plan or action for avoidance, neutralization, mitigation, disqualification or request for a waiver has been obtained from the Laboratory OCI Determining Official, Conflict of Interest Program, LC/GL-1. See Documentation *below*.

If upon review of the *Pre-Procurement Fact Sheet* and the statement of work, the procurement specialist concludes that the work is not Advisory and Assistance Services in nature, further OCI review is not required. The rationale for the conclusion that OCI does not exist shall be documented in the procurement file.

Solicitation

If the procurement specialist's review results in the conclusion that the work is for Advisory and Assistance Services, the following clauses shall be included in the solicitation:

- *Organizational Conflicts of Interest Disclosure - Advisory and Assistance Services*, (Form 903b) (Exhibit 9.3b), and
- *Organizational Conflicts of Interest*, (Form 903c), (Exhibit 9.3c).

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Review of OCI  
Disclosure and  
Other Documents

Prior to award of a subcontract for Advisory or Assistance Services, the procurement specialist shall evaluate the apparent successful offeror's Disclosure, as prescribed in Exhibit 9.3b, and other credible information to determine if an apparent or significant potential organizational conflict of interest exists.

Examples of other credible information, which might indicate the presence of an actual or significant potential OCI may include, but are not limited to, the following:

- Offeror's proposal
- Résumés of offeror's key personnel,
- Work that the offeror has done, is doing, or plans to do for others, and
- Annual Report/10K Report

If information from the Disclosure raises other elements of conflict or more questions, the procurement specialist may request further details. If the offeror refuses, the procurement specialist may disqualify the offeror.

Criteria for  
Recognizing OCIs

All relevant facts with respect to a particular offeror must be reviewed and evaluated to determine whether an actual or significant potential OCI exists or whether there is little or no likelihood that such a conflict exists. This determination should be made in the light of common sense and good business judgement based upon all relevant facts and the work to be performed.

The following questions should be considered when evaluating the collected documents for an actual or significant potential OCI:

- Are there conflicting roles which might bias a subcontractor's judgement in its work for the Laboratory?
- Did something take place in the past that gives the offeror an unfair advantage for the current procurement action?
- Will performance of the current proposed work effort result in the offeror having an unfair competitive advantage in a future subcontract?

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Note: An unfair competitive advantage does not include the normal flow of benefits from the performance of a subcontract. While an incumbent subcontractor may have a competitive advantage, it does not have an “unfair” competitive advantage.

Avoidance,  
Neutralization,  
Mitigation, or  
Disqualification

If an actual or significant potential OCI is determined to exist, the procurement specialist shall attempt to develop a plan or action that will avoid, neutralize or mitigate the OCI. In developing the plan or action, the procurement specialist should contact the offeror, provide the reasons that could lead to its disqualification, and allow the offeror a reasonable opportunity to respond.

Avoidance

An OCI can be avoided by actions such as revising the statement of work to exclude particular work, or including clauses in the subcontract to eliminate the circumstances that create the OCI of the offeror.

Neutralization

If an OCI would be present by virtue of one or more potential offerors having access to information that is not generally available to all potential offerors, the OCI could be neutralized by making all information available to all offerors in order to level the playing field.

Mitigation

Mitigation may be accomplished by including provisions that exclude the subcontractor from participating at any level in providing hardware resulting from the work performed under the instant procurement or by precluding award of a future subcontract to the instant subcontractor for a specified period of time or until the occurrence of a specified future event, such as completion of an initial production quantity.

Disqualification

If an actual or potential significant OCI cannot be avoided, neutralized, or mitigated or if the offeror refuses to disclose information required in the solicitation Disclosure (Exhibit 9.3b), the offeror must be disqualified from award.

Award with an OCI

If an OCI exists and cannot be avoided or mitigated, award of the procurement action may only be made when DOE determines that it is in the best interest of the Government to do so. The procurement specialist shall prepare a request for waiver for the Procurement Manager to submit to the DOE/AL Contracting Officer.

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An appropriate written finding must be published by DOE-HQ in the Federal Register and appropriate clauses must be included in the subcontract to mitigate the conflict, to the extent feasible, prior to award. It is expected that this procedure will be used very rarely and only in unusual circumstances.

## Documentation

The procurement specialist's recommendation for avoidance, neutralization, or mitigation of the OCI or the disqualification of the offeror from award shall be documented and an OCI package forwarded to the Laboratory OCI Determining Official, Conflict of Interest Program, LC/GL-1 for review and approval.

Upon approval of the plan or action by the Laboratory OCI Determining Official, the approved process shall be included as a special provision in the subcontract.

Disqualification — If disqualification of the offeror is warranted and approved, the file shall be documented. If the offeror to be disqualified is sole sourced, the action shall be cancelled. If the procurement action is competitive, the procurement specialist shall undertake making award, including an OCI review, to the next ranked offeror.

If the OCI Determining Official finds that an actual or potential OCI has not been avoided, neutralized, or mitigated, the procurement specialist must determine if disqualification is appropriate. If disqualification is not appropriate, a request to for a waiver (see Award with an OCI *above*) must be submitted.

## OCI After Award

If changes, including additions, to the facts disclosed by the subcontractor prior to award, occur during performance of the subcontract, immediate and full disclosure of such changes shall be made in writing to the procurement specialist. Such disclosure may include a description of any action, which the subcontractor has taken or proposes to take to avoid, neutralize, or mitigate any resulting conflict of interest. The procurement specialist may, however, terminate the subcontract for convenience if it deems such termination to be in the best interest of the Laboratory.

In the event that the subcontractor was aware of facts required to be disclosed or the existence of an actual or potential organizational conflict of interest and did not disclose such facts or such conflict of interest to the Laboratory, the subcontract may be terminated for default.

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Significant  
Modifications

When a significant modification (i.e., one which exceeds the simplified acquisition threshold and/or increases the original scope) is proposed to be made to a subcontract for Advisory or Assistance Services, a new *Pre-Procurement Fact Sheet* must be obtained from the requester and a new OCI Disclosure must be obtained from the subcontractor.

If any relevant facts are disclosed that reveal the existence of an actual or significant potential OCI, the procurement specialist shall follow the procedures described above to avoid, neutralize, mitigate, or obtain a waiver prior to awarding the modification.

## REVIEWS/APPROVALS:

Procurement Manager

Requests for a waiver must be submitted to the Procurement Manager for transmittal to the DOE Contracting Officer.

OCI Determining  
Official

In the case of avoidance, neutralization, mitigation, disqualification, or waiver all procurement actions subject to this SI shall be reviewed and approved by the Laboratory OCI Determining Official prior to award or transmittal to DOE.

DOE

In the case of a waiver of an OCI, all procurement actions subject to this SI shall be reviewed and approved by the DOE/AL Contracting Officer and published in the Federal Register by DOE/HQ prior to award.

## RESPONSIBILITIES:

Procurement  
Specialist

The procurement specialist must

- Determine the applicability of OCI procedures to the procurement action and, if applicable, obtain a *Pre-Procurement Fact Sheet*;
- If appropriate, document the nonapplicability of OCI procedures;
- If it is determined that Advisory and Assistance Services are to be acquired, include the *Organizational Conflicts of Interest Disclosure – Advisory and Assistance Services* (Exhibit 9.3b), and *Organizational Conflicts of Interest* (Exhibit 9.3c) in the solicitation;



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- Review and analyze all information that might indicate the presence of an apparent or significant potential OCI;
- Take all appropriate actions to avoid, neutralize, or mitigate any apparent or significant potential OCI;
- If avoidance, neutralization, or mitigation are not possible, determine if disqualification is appropriate;
- Prepare an OCI package for the Laboratory OCI Determining Official when OCI procedures apply;
- Obtain review and approval from the Laboratory OCI Determining Official before making an award;
- If a finding of little or no likelihood of an OCI is made as a result of an avoidance, neutralization, or mitigation plan, include a special provision in the subcontract to activate the plan;
- Include the *Organizational Conflicts of Interest* (Exhibit 9.3c) in all subcontracts for Advisory and Assistance Services; and
- Obtain a new OCI Disclosure when a significant modification to a subcontract is planned.

## REFERENCES:

Prime Contract Clause 12.1  
DEAR 952.209-8